APPENDIX A

Dec 29 1967

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, KENTUCKY, SECURITY TRUST COMPANY, and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, KENTUCKY, *Defendants*

Order

The motions of Central Bank and Trust Company and Dages I. Boyle for leave to intervene as parties plaintiff in order to file certain motions allegedly affecting them is sustained and the motions filed on September 15, 1967 are made a part of the record for the court's consideration and ruling.

The motions that the court not accept the proposed final judgment are overruled.

The motion to reconsider the court's decision of February 1, 1967 is overruled.

The plaintiff-intervenors' complaints, tendered on September 15, 1967 are ordered filed as of that date and the prayers of the complaints and each of them are denied.

See Opinion.

/s/ MAC SWINFORD
Mac Swinford, *Judge*

Dec 29 1967

APPENDIX B

Opinion

This case has had a long and tortuous career. The record is now before the court on a stipulation between the plaintiff and defendants to enter a proposed final judgment which is tendered with the stipulation. Both the stipulation and the proposed final judgment are made a part of this opinion as appendages.

To give a detailed and comprehensive history of this case would add nothing to an understanding of the conclusions the court reaches here and would be but boring both to the litigants and their counsel who have been over these facts so many times. It is necessary, however, in order to properly establish the basis of the motions now before the court to give very briefly the steps by which the case has come to this point.

Lexington, Kentucky is a relatively small city. It is the center and heart of a rich agricultural section known as the Bluegrass region of Kentucky. Formerly there was relatively little industry in the locality and the principal business in Lexington and its environs was agriculture. While agriculture is still most likely the principal business of the region, many industrial plants have moved into Lexington and the surrounding county seat towns and have become a major source of the economic life of the locality. The First National Bank and Trust Company of Lexington and the Security Trust Company prompted by an idea, so they say, that big business requires big financing, arranged between themselves to merge their banking operations into one large commercial bank and trust company to be known as the First Security National Bank and Trust Company of Lexington. All preliminary steps were taken and the proposed merger was approved by the Comptroller of the Currency of the United States. The merger was consummated on March 1, 1961 and later

on the same day the United States filed its complaint against the two independent banking institutions, pursuant to Section 4 of the Sherman Act, seeking to enjoin alleged violations of Sections 1 and 2 of that Act. 15 U.S.C.A. 1, 2. By an amended complaint, filed on March 3, 1961, the First Security National Bank and Trust Company of Lexington was joined as a party to the action.

A trial was held in this court, at which the parties and all competitors were given an opportunity to be heard in opposition to the merger. The court was of the opinion that there was no violation of either Section 1 or Section 2 of the Sherman Act, but as a precautionary measure required, by order, that the defendants agree to keep separate their respective business transactions until the time for an appeal had expired, or, in the event of an appeal, until the case had been finally determined. The opinion of the trial court is found in the case of U. S. v. First National Bank & Trust Co. of Lexington, 208 F.Supp. 457.

The United States prosecuted an appeal and on April 6, 1964, the Supreme Court reversed the judgment of this court and held that the merger of the defendants, First National Bank and Trust Company of Lexington and the Security Trust Company, violated Section 1 of the Sherman Act. It declined to review the question posed by the complaint under Section 2 of the Sherman Act and remanded the case to this court for further proceedings in conformity with its opinion. U. S. v. First National Bank & Trust Co. of Lexington, et al, 376 U. S. 665.

No steps were taken to effect a separation of the banking business of the First National Bank and Trust Company of Lexington and the Security Trust Company, being operated as the First Security National Bank and Trust Company of Lexington. This court was of the opinion that the defendants were ignoring the decision of the Supreme Court and deliberately delaying a compliance with its mandate and thereupon entered an order holding the

banks in contempt. An appeal was taken from this order and it was reversed by the Supreme Court on the ground that no order of divestiture had been entered and that therefore the defendants were not in contempt of any order of the court.

On March 18, 1965, this court entered a divestiture order which required the creation of a separate, competitive and independent commercial bank to be the equivalent of the former Security Trust Company. Subsequently, on April 29, 1965, an order was entered clarifying in minor respects the order of March 18, 1965.

Before the divestiture, directed by these orders, was accomplished, the Congress of the United States enacted Public Law 89-356, 80 Stat. 7, designated as the Bank Merger Act of 1966. Section 2 (a) of this Act provides as follows:

> "Any merger, consolidation, acquisition of assets, or assumption of liabilities involving an insured bank which was consummated prior to June 17, 1963, the bank resulting from which has not been dissolved or divided and has not effected a sale or distribution of assets and has not taken any other similar action pursuant to a final judgment under the antitrust laws prior to the enactment of this Act (Feb. 21, 1966), shall be conclusively presumed to have not been in violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2) (section 2 of Title 15)."

After this statutory enactment there is no indication from the record that the defendants made any effort to comply with the orders of the court with respect to the matter of divestiture.

On April 28, 1966 the United States moved the court for an adjudication that the merger of the defendants

violated Section 2 of the Sherman Act because the Bank Merger Act does not apply to banks which are in violation of Section 2 of the Sherman Act. By order of February 1, 1967, the motion was overruled for reasons set forth in a written opinion. U. S. v. First National Bank & Trust Co., et al, 263 F. Supp. 268.

On March 30, 1967, the plaintiff filed a notice of appeal to the Supreme Court from the order of this court of February 1, 1967. So far as the court is advised no further steps were taken to prosecute the appeal and on August 7, 1967, the plaintiff and defendants filed the stipulation in this court consenting to the entry of a final judgment. See appendix.

On September 15, 1967 the Central Bank and Trust Company, a commercial banking institution of Lexington, Kentucky, filed a motion "for leave to intervene as a party plaintiff in order: (1) to move that the Court not accept the proposed Final Judgment prior to hearing Central Bank's motions to intervene and for other relief; (2) to move that the proposed Final Judgment not be accepted by this Court; and (3) to move that this Court reconsider its decision of February 1, 1967, upholding the consolidation of First National Bank and Trust Company of Lexington and Security Trust Company resulting in the establishment of First Security National Bank and Trust Company of Lexington; and (4) to permit it to file the intervening Complaint attached hereto."

On the same date Dages I. Boyle, individually and as a representative of the First National Bank and Trust Company of Lexington and the Security Trust Company, filed his motion to intervene as a party plaintiff in order to oppose the entry of the final judgment. Dages I. Boyle is a citizen and resident of Fayette County, Kentucky, a stockholder in the defendant Security Trust Company and a stockholder in the First Security National Bank and Trust Company of Lexington.

Both the plaintiff and the defendants vigorously oppose the right of these two intervenors to be permitted to intervene and be heard on the question of the propriety of the entry of the stipulation and final judgment.

The court is of the opinion that both the petitioners should be permitted to intervene and thereby permitted to be heard in opposition to the proposed final judgment. I rest my decision on the case of Cascade Natural Gas v. El Paso Natural Gas, 386 U. S. 129, which I believe to be directly in point. If the Court by its decision in Cascade grants intervention of right to any volunteer claiming to speak for the public interest when he can convince a court that the Government might have used bad judgment in conducting or settling a lawsuit, these intervenors are well within the class entitled to intervene. The interpretation of the opinion is that made by a member of the Court who sat in the case. See dissenting opinion of Mr. Justice Stewart.

Equal justice under law means that any court action, whether civil or criminal, should be a satisfying experience to each litigant; not that each litigant would be satisfied with the results, but satisfied that his rights have been thoroughly and objectively considered. I do not mean to imply that the United States has not conscientiously represented the public interest, but I do seriously question its judgment in not permitting this case to go to a final decision by the Supreme Court. The plaintiff here had consistently taken the position that the action of these two banking institutions was unlawful and contrary to the public interest of the Lexington community. It was eventually sustained in this position by the Supreme Court. When the Congress sought to legislate the question by the enactment of the statute referred to, the United States again vigorously challenged the sufficiency of the statute to cover the issues presented by the record in this court. Its position was overruled and it proceeded

to take an appeal. Suddenly, and I may assume without warning to anyone, the plaintiff makes about a ninety percent capitulation and now becomes the advocate of the merger.

I do not question the right of the United States or any other public agency to compromise litigation in which it is involved, but I do believe that the United States should go very slowly in cases of this character where the whole community, comparatively small though it may be, is deeply concerned and especially where the Supreme Court in reversing the lower court said:

> ". . . we think it clear that significant competition will be eliminated by the consolidation. . . . ; that the 'image' of 'bigness' is a powerful attraction to customers, an advantage that increases progressively with disparity in size; and that the multiplicity of extra services in the trust field which the new company could offer tends to foreclose competition there.
>
> "We think it clear that the elimination of significant competition between First National and Security Trust constitutes an unreasonable restraint of trade. . . ."

Compromising cases of this magnitude, when they have reached the stage that this case has reached, creates a feeling of uneasiness in the public mind. American justice is so constituted that not only should it be fair and impartial but the litigants and the public should know that it is fair and impartial.

I may assume that the decision of this court will be reviewed by a higher court and in order to give such reviewing court a ruling on all questions presented, with a hope of bringing the litigation to a conclusion within a reasonable time, I will proceed to rule upon each of the questions raised by the intervenors:

(1) The attack upon the Bank Merger Act of 1966 as unconstitutional is not well taken. The litigation was not

final, notwithstanding the fact that an order directing divestiture had been entered, as the order itself retained the case on the docket for the purpose of guiding and determining whether or not any action on the part of the defendants contravened the directive of the order. Nothing had been done toward carrying out the orders of the court and no report of progress had been made of record. To deny the Congress the right to enact legislation finally settling a question of fact that was still open and subject to further orders of the court, would invite a criticism of ignoring the separation of powers assured by the Constitution to a much greater extent than is urged here by the intervenors in the criticism of the Congressional enactment involved. Paramino Co. v. Marshall, 309 U. S. 370. I believe the question is settled in the case of State of Pennsylvania v. Wheeling and Belmont Bridge Co., 59 U. S. 421.

(2) The court declines to reconsider its ruling sustaining the merger on Section 2 of the Sherman Act for the reasons set forth in its opinion in U. S. v. First National Bank & Trust Company of Lexington, et al., 263 F. Supp. 268.

(3) There has been no showing of bad faith on the part of the United States and the final judgment submitted with the stipulation of August 7, 1967 should be entered and it is this day signed by the court.

An order in conformity with this opinion is this day entered.

Dec 29 1967

/s/ Mac Swinford
Mac Swinford, *Judge*

APPENDIX C

Stipulation

It is stipulated by and between the undersigned parties, by their respective attorneys, that paragraphs (1) and (2) of the stiplation filed on August 7, 1967, are amended as follows:

(1) The parties consent that a Final Judgment in the form attached may be filed and entered by the Court at any time after the expiration of forty (40) days following the date of filing of this Stipulation without further notice to any party or other proceedings, either upon the motion of any party or upon the Court's own motion, provided that plaintiff has not withdrawn its consent as provided herein;

(2) The plaintiff may withdraw its consent hereto at any time within said period of forty (40) days by serving notice thereto upon the other parties hereto and filing said notice with the Court.

Dated: September 1, 1967

For The Plaintiff:

/s/ EDWIN M. ZIMMERMAN
Edwin M. Zimmerman
Acting Assistant
Attorney General

/s/ WILLIAM H. MCMANUS
William H. McManus
Attorney,
Department of Justice

/s/ W. D. KILGORE, JR.
William D. Kilgore, Jr.

/s/ CHARLES L. WHITTINGHILL
Charles L. Whittinghill
Attorneys,
Department of Justice

Filed: September 5, 1967

For The Defendants:

ARNOLD & PORTER BY
/s/ VICTOR H. KRAMER
Victor H. Kramer

APPENDIX D

Final Judgment

Plaintiff, United States of America, having filed its complaint herein on March 1, 1961, pursuant to Section 4 of the Sherman Act seeking to enjoin alleged violations of Sections 1 and 2 of the Sherman Act, and defendant First Security National Bank and Trust Company of Lexington, having appeared and filed its answer to such complaint, denying the substantive allegations thereof, this Court (Judge Ford) on July 30, 1962, after trial, having entered judgment for defendants holding that no violation of the Sherman Act had been shown (208 F. Supp. 457), plaintiff having appealed to the Supreme Court of the United States, the Supreme Court having on April 6, 1964 reversed the judgment of this Court and having held that the merger of the defendants First National Bank and Trust Company of Lexington and Security Trust Company violated Section 1 of the Sherman Act and having declined to review the questions posed by the complaint under Section 2 of the Sherman Act, and having remanded the case to this Court for further proceedings in conformity with its opinion (376 U.S. 665), the Bank Merger Act (Public Law 86-463, 74 Stat. 129) having been amended on February 21, 1966 (Public Law 89-356, 80 Stat. 7), plaintiff on April 28, 1966 having filed its motion in this Court for an adjudication that the aforesaid merger violates Section 2 of the Sherman Act, this Court on February 1, 1967, having filed its order denying said motion and having filed its opinion upholding said merger, plaintiff on March 30, 1967, having filed its notice of appeal to the Supreme Court of the United States, plaintiff and defendant First Security National Bank and Trust Company of Lexington, by their respective attorneys, having each consented to the making and entry of this Final Judgment without this Final Judgment constituting any evidence or an admission by either party hereto with respect to any issue of fact or law herein, and

this Court having considered the matter and being duly advised.

Now, therefore, upon the consent of the parties hereto, it is hereby

Ordered, adjudged and decreed, as follows:

I.

This Court has jurisdiction of the subject matter of this action and of the parties hereto. The complaint states a claim upon which relief may be granted against First Security National Bank and Trust Company of Lexington under Section 2 of the Act of Congress of July 2, 1890 (15 U.S.C. § 2), commonly known as the Sherman Act, as amended.

II.

As used in this Final Judgment:

(A) "First Security" means defendant First Security National Bank and Trust Company of Lexington which is a consolidation of defendant First National Bank and Trust Company of Lexington and defendant Security Trust Company.

(B) "Trust account" means any account held in the Trust Department of a commercial bank or trust company in Fayette County, Kentucky in its capacity as (1) trustee; (2) executor; or (3) custodian of securities or other property.

(C) "Non-testamentary trust account" means any account held in the Trust Department of a commercial bank or trust company in Fayette County, Kentucky in its capacity as trustee or custodian of securities or other property in which the trusteeship or custodianship was not created by Last Will and Testament.

III.

Defendant First Security is enjoined and restrained for ten (10) years from the effective date of this Final Judgment from acquiring control over or merging with any other commercial bank having one or more offices in Fayette County, Kentucky.

IV.

Defendant First Security is enjoined and restrained for five (5) years from the effective date of this Final Judgment from establishing any additional branch banking offices in Fayette County, Kentucky if, as a result of the establishment of such branch, defendant First Security would own or control more than one third of the total number of offices conducting a commercial banking business in Fayette County, Kentucky.

V.

Defendant First Security is enjoined and restrained for ten (10) years from the effective date of this Final Judgment from acting as trustee or custodian of any non-testamentary trust account created subsequent to the effective date of this Final Judgment; provided, however, that nothing in this Final Judgment shall prevent defendant First Security from acting as trustee or custodian of any assets pursuant to an agreement executed at any time by any person (or spouse of any person) who is or at any time hereafter becomes an officer, director (including advisory directors) or employee of defendant First Security.

VI.

Defendant First Security may petition this Court at any time for [or ?] times after January 1, 1969 to modify this Final Judgment by striking Section V therefrom and any such petition shall be granted if defendant First Security shall

show to the satisfaction of this Court that in the year preceding the filing of such petition, it was acting as trustee, executor and/or custodian of either less than 25% by number, or less than 50% by dollar value of total assets (or both), of all trust accounts held by commercial banks in Fayette County, Kentucky. Plaintiff shall cooperate with defendant First Security in obtaining statistics showing the number and dollar value of trust accounts.

VII.

For the purpose of determining or securing compliance with this Final Judgment and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to First Security at its principal office, be permitted:

(1) Reasonable access, during office hours of First Security, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of First Security relating to any matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of First Security and without restraint or interference from it, to interview officers or employees of First Security, who may have counsel present, regarding any such matters.

For the purpose of securing compliance with this Final Judgment, First Security, upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and upon reasonable notice made to its principal office, shall submit such reasonable reports in writing to the Department of Justice

with respect to matters contained in this Final Judgment as may, from time to time, be requested for the enforcement of this Final Judgment. No information obtained by the means provided in this Section VII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the executive branch of plaintiff except in the course of court proceedings to which the United States of America is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

VIII.

Jurisdiction is retained by this Court for the purpose stated in the Section VI of this Final Judgment and for the purposes of enabling any party to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, the modification or termination of any provision thereof, for the enforcement of compliance herewith, and for the punishment of violations hereof.

/s/ Mac Swinford
United States District Judge

Dated: December 29, 1967

APPENDIX E

Order

The motion to adjudicate the First National Bank and Trust Company of Lexington and the Security Trust Company as in violation of Section 2 of the Sherman Act and for the entry of a final judgment of divestiture is overruled. See opinion this day filed.

/s/ MAC SWINFORD
Mac Swinford, *Judge*

February 1, 1967.

APPENDIX F

Opinion

SWINFORD, Chief Judge.

A detailed recitation of the history of this case is unnecessary and impertinent to an understanding of the decision on the matter now to be determined. In the interest of clarity of the conclusions reached, I must, however, preface this opinion with a brief summary of the steps which have brought the litigation to this stage.

The complaint in this action was filed on March 1, 1961 and alleged that the merger of the defendants, First National Bank and Trust Company of Lexington and the Security Trust Company, was a violation of Sections 1 and 2 of the Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U.S.C. §§ 1, 2. After a somewhat extended trial on the merits, this court on July 27, 1962 held that the merger was not in violation of either Section 1 or 2 of the Sherman Act and dismissed the complaint. The case was heard and the decision made by Honorable Hiram Church Ford, at that time Chief Judge of the Eastern District of Kentucky and presently serving as a Senior Judge in this district. See opinion, 208 F.Supp. 457.

On April 6, 1964 the Supreme Court reversed the judgment and held that the merger was in violation of Section 1 of the Sherman Act but did not determine the question posed by Section 2 of that Act. See opinion, 376 U.S. 665, 84 S.Ct. 1033, 12 L.Ed.2d 1.

On March 18, 1965 this court entered an order requiring divestiture of the properties belonging to the consolidated banking institution and ordered and directed the creation of a separate, competitive and independent commercial bank to be the equivalent of the former Security Trust Company. Before the divestiture and related orders of the court were effected, the Congress of the United States enacted Public Law 89-356, 80 Stat. 7. This Act became law on February 21, 1966 and provides in pertinent part as follows:

> "Sec. 2(a) Any merger, consolidation, acquisition of assets, or assumption of liabilities involving an insured bank which was consummated prior to June 17, 1963, the bank resulting from which has not been dissolved or divided and has not effected a sale or distribution of assets and has not taken any other similar action pursuant to a final judgment under the antitrust laws prior to the enactment of this Act, shall be conclusively presumed to have not been in violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2)."

The record is before the court on the following motion:

> "The United States of America, plaintiff herein, hereby moves the Court, on the record herein and on the grounds set forth in the attached affidavit of Lawrence F. Noble, for an adjudication that the merger of the defendants First National Bank and Trust Company of Lexington and Security Trust Company is in violation of section 2 of the Sherman Act (15 U.S.C. 2) and

for the entry of a final judgment of divestiture pursuant to that adjudication."

The motion is overruled for the following reasons.

Since the Supreme Court did not reverse the decision of this court on Section 2 of the Sherman Act, that ruling is the law of the case. The case was thoroughly and carefully tried and the issues determined by Judge Ford and so far as I am concerned that concludes the matter. For a judge of coordinate jurisdiction to reverse a judgment of a fellow judge who tried the case, saw and heard the witnesses testify and recorded his findings and conclusions, both of law and fact, in a lucid opinion, is to do disservice to the law and create disrespect for it. There must be an end to litigation and I can well understand why lay people would be thoroughly confused if a question of law at nine o'clock was decided by one judge and at ten o'clock the same question in the same case was decided to the contrary by another judge from the same bench. While there may be instances in which such a reversal would be justified, this is not one of them. Such a legal prerogative is questionable under any circumstance and I personally hold to the view that the law would be best served if reviews of decisions of trial judges were limited to appellate tribunals.

Notwithstanding my personal view of the matter, I recognize that a judge of coordinate jurisdiction does have the power to reexamine a prior decision of a fellow judge where there is a patent error. I find no such error in this record. A succinct statement of the law on this subject is found in the following quotation from the opinion in the case of In Re Carmona, D.C., 224 F.Supp. 497.

"It is also expressed in the many cases which hold that 'judges of co-ordinate jurisdiction sitting in the same court and in the same case should not overrule the decisions of each other,' except in the most unusual circumstances. TCF Film Corp. v. Gourley, 240 F.2d

711 (3d Cir. 1957). See, United States v. Wheeler, 256 F.2d 745 (3 Cir.), cert. denied, 358 U.S. 873, 79 S.Ct. 111, 3 L.Ed.2d 103, rehearing denied, 358 U.S. 913, 79 S.Ct. 229, 3 L.Ed.2d 234 (1958), and Carnegie Nat. Bank v. City of Wolf Point, 110 F.2d 569 (9th Cir. 1940). A further expression of this concept is found in the rule that where a judge has decided the effect of a particular document or transaction, a judge of co-ordinate jurisdiction should not, even in an entirely separate case, decide that the same document is of a different effect. See e. g. United States v. Citizens National Trust and Savings Bank, 166 F.Supp. 410 (S.D. Cal. 1958), affirmed, 270 F.2d 128 (9th Cir. 1959),

"Finally, this important principle has given rise to another rule, which is directly applicable to the case at hand. That is the rule that where a judge has decided a question of law in one manner a judge of co-ordinate jurisdiction should not normally undertake to decide it another way. This rule, based upon judicial comity as well as good judicial administration, is of great universality. See e. g., In re Naturalization of Alacar, 196 F.Supp. 564 (D.Hawaii 1961); Rojas-Gutierrez v. Hoy, 161 F.Supp. 448 (S.D.Cal. 1958), affirmed, 267 F.2d 490 (9th Cir. 1959); Brusselback v. Cago Corp., 24 F.Supp. 524 (S.D.N.Y. 1938); and the multitude of federal and state court cases cited in 21 C.J.S. Courts § 196, note 94."

In the second place, it is my judgment that it was the intention of the Congress by the enactment of the Bank Merger Act to immunize this particular merger from all further attacks on the ground that it violated the law. I do not have the report of the House Committee on Banking and Currency before me, but the brief for the defendants quotes the following from the report and as so represented to the court I consider it authentic:

"Your Committee considered carefully what to do with the six banks against which the Department of Justice now has cases pending. The Attorney General strenuously opposed any legislation which might relieve these six banks from further prosecution under the antitrust laws. Other witnesses urged equally strongly that all six mergers should be relieved of any further liability under the antitrust laws. Three of these mergers were consummated and the antitrust suits instituted before June 17, 1963, when the Supreme Court for the first time (United States v. Philadelphia National Bank, 374 U.S. 321 [83 S.Ct. 1715, 10 L.Ed.2d 915]) held that bank mergers were subject to section 7 of the Clayton Act. These three cases were the Lexington, Ky., merger, the Manufacturers Hanover merger in New York City, and the Continental Illinois merger in Chicago. Three other mergers—in California, Tennessee, and St. Louis—were consummated after the Philadelphia decision and with knowledge of its possible effect on their situations.

"Under these conditions, your committee took the position that the first three mergers—the 'pre-Philadelphia' mergers—(of which defendant's was one) should be exempted from Section 7 of the Clayton Act and section 1 of the Sherman Act, like all other mergers consummated before the Philadelphia case. These three banks, acting in good faith, and their depositors and other customers and their communities should not be required to suffer the confusion, the disruption, and the losses which would result from efforts to unscramble them."

In the light of the whole history of this litigation and as the record now stands, it is my opinion that the merger of these two banking houses must be upheld.

An order in conformity with this opinion is this day entered.

February 1, 1967

APPENDIX G

Order

The Supreme Court of the United States held the consolidation of the Security Trust Company into the First National Bank and Trust Company of Lexington, which resulted in the formation of the First Security National Bank and Trust Company of Lexington, to be in violation of Section 1 of the Sherman Act. Its judgment, filed May 4, 1964, reversed the judgment of this Court and remanded this cause for proceedings in conformity with its opinion.

It is ORDERED, ADJUDGED AND DECREED as follows:

I

Defendant, First Security National Bank and Trust Company of Lexington, shall without delay take all necessary steps to create a separate, competitive and independent commercial bank which shall be the equivalent of the former Security Trust Company at the time of its consolidation with the former First National Bank and Trust Company of Lexington, including, but not limited to its name, its directors, its officers and personnel, its offices, furniture and equipment, its capital surplus and undivided profits, and loans, savings, checking and trust accounts, plus its proportionate share of any increments and improvements since that date. Subject to such limitations on the eligibility of stock to be voted as may be appropriate to insure the independence of operation of the banks, all of the capital stock of the banking association to be created by the defendant, First Security National Bank and Trust Company of Lexington, shall be issued in the name of a corporate trustee to be held by it until directed by order of this court to be distributed to the proper shareholders.

There shall be no interlocking directorates or identity of personnel on any level between the present banking institution and the new banking institution to be created.

II

The directors of First Security National Bank and Trust Company who were directors of First National Bank and Trust Company and those who were directors of Security Trust Company will constitute the directors of their former institutions until such time as stockholders elect directors. Directors who were elected since the merger for the first time will lose their directorships.

III

The First Security National Bank and Trust Company of Lexington shall without delay change its name to First National Bank and Trust Company of Lexington. It shall destroy all blank stationery, checks and records bearing the name First Security National Bank and Trust Company of Lexington. It shall cease conducting any advertising in the name of First Security National Bank and Trust Company of Lexington. It will remove from any real estate it occupies the name First Security National Bank and Trust Company of Lexington.

IV

The United States Department of Justice shall have authority to examine and inspect all the records of the defendant, First Security National Bank and Trust Company of Lexington, as presently named, or First National Bank and Trust Company of Lexington after the name is changed as herein directed, for the purpose of being advised that it is complying with the provisions of this order. The Department shall be kept fully advised by the bank as to the progress made in fulfilling the purpose of this order.

V

The purpose of this order is to establish competitive banking between the institutions involved as it existed prior to the unlawful merger on March 1, 1961. Any

effort to circumvent that purpose on the part of any individual or corporate institution will be treated as a contempt of this court.

VI

Jurisdiction is retained for the purpose of enabling any of the parties to apply to this Court for such orders and directions as may be necessary for the construction or carrying out of this order, for the modification of any of the provisions hereof, for the enforcement of compliance herewith and for the punishment of violations hereof.

-/s/ MAC SWINFORD
Mac Swinford, *Judge*

March 18, 1965

APPENDIX H

Order of Clarification of Order of Divestiture of March 18, 1965

This cause coming on for hearing before the Court on petition of the defendant for clarification of an order of divestiture entered herein on March 18, 1965, and the plaintiff having filed its response thereto in which it concurred in the petition for clarification, and the Court, having heard arguments of counsel thereon and being advised, grants the petition for clarification and in accordance therewith it is ordered and adjudged as follows:

I

That Paragraph I of the order of March 18, 1965, be clarified so as to read as follows:

Defendant, First Security National Bank and Trust Company of Lexington, shall without delay take all necessary steps to create a separate, competitive and independent commercial bank which shall be the equivalent of the former

Security Trust Company at the time of its consolidation with the former First National Bank and Trust Company of Lexington, including, but not limited to its name, its directors, its officers and personnel, its offices, furniture and equipment, its capital surplus and undivided profits, and loans, savings, checking and trust accounts, plus its proportionate share of any increments and improvements since that date. Subject to the limitations on the eligibility of stock to be voted as hereinafter set out to insure the independence of operation of the banks, all of the capital stock (except directors' qualifying shares) of the banking association to be created by the defendant, First Security National Bank and Trust Company of Lexington, shall be issued in the name of a corporate trustee to be held by it until directed by order of this Court to be distributed pro rata to those persons who are the shareholders of First National Bank and Trust Company of Lexington (formerly First Security National Bank and Trust Company of Lexington) at the time of said distribution.

There shall be no interlocking directorates or identity of personnel on any level between the present banking institution and the new banking institution to be created.

The limitations on the eligibility of stock to be voted are as follows:

(A) To assure the independence of operation of the banks, each bank shall for a period of ten (10) years provide plaintiff reasonable notice and an opportunity to apply to the Court for such orders as may be necessary concerning the manner in which the bank proposes to vote these shares of the other bank held in its trust department not treated, pursuant to the provisions of paragraph (B) hereof, as stock held by the beneficial owners. Each bank shall also take all such steps as may reasonably be required to secure the instructions of the beneficial owners of such shares concerning the manner in which such shares are to be voted.

(B) The by-laws of each of the banks shall contain limitations on the eligibility for voting, in any election of directors or plan of merger or consolidation, of those shares in excess of 1% of its outstanding shares which are owned or controlled, directly or indirectly, by any stockholder who owns or controls, directly or indirectly, more than 1% of the outstanding shares of the other bank. The by-laws shall further provide that shares held in the trust department of any bank or trust company in a fiduciary capacity shall be treated as owned or controlled only by the beneficial owner thereof when voted by a co-trustee not associated with the bank or trust company or where the bank or trust company has notified in writing the beneficiaries of the trusts requesting their instructions as to voting and has received written instructions from the beneficiaries concerning the manner in which such stock is to be voted and votes such stock in accordance with such instructions. The bank or trust company may, subject to the provisions of paragraph (A) hereof, exercise such voting power as has been given by the trust instrument if the beneficiaries shall fail to respond to the timely request of the bank or trust company for instructions as to voting, or if there is no living beneficiary competent to give such instructions.

II

Section III of the order of this Court of March 18, 1965, is hereby clarified as follows:

The First Security National Bank and Trust Company of Lexington shall without delay change its name to First National Bank and Trust Company of Lexington. It shall destroy all blank stationery, checks and records bearing the name First Security National Bank and Trust Company of Lexington. It shall cease conducting any advertising in the name of First Security National Bank and Trust Company of Lexington. It will remove from any real estate it occupies the name First Security National

Bank and Trust Company of Lexington. All of the foregoing acts shall be completed immediately after the banking association to be formed pursuant to Section I of the order of this Court of March 18, 1965, opens its doors for business.

/s/ MAC SWINFORD
United States District Judge

April 29, 1965

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

Civil Action No. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, *Defendants*

Order

This cause coming on to be heard on motion of the plaintiff for a temporary restraining order enjoining defendants named in the caption from taking any steps in furtherance of an agreement between First National Bank and Trust Company of Lexington and Security Trust Company to merge and consolidate, and the Court having heard statements of counsel and having considered same together with affidavits submitted by plaintiff in support of its motion and the verified response filed by defendant, First Security National Bank and Trust Company of Lexington herein, and it appearing to the Court that pursuant to the approval of the Comptroller of the Currency of the United States the first National Bank and Trust Company of Lexington and Security Trust Company were consolidated as of the opening of business on March 1, 1961, into defendant First Security National Bank and Trust Company of Lexington as a National Banking Association under the laws of the United States; and the Court being advised, it is now ordered and adjudged as follows:

1. That defendant, First Security National Bank and Trust Company of Lexington, as a National Banking Association under the laws of the United States, is duly author-

ized to conduct and carry on a banking business in Lexington, Kentucky;

2. Until the further orders of the Court, the defendant, First Security National Bank and Trust Company of Lexington, shall insofar as may be reasonably possible under the national banking law of the United States and the applicable regulations of the Comptroller of the Currency, the Federal Reserve Board and the Federal Deposit Insurance Corporation, and in accordance with sound banking practices, keep and maintain its assets, liabilities, internal records and accounts in such manner that in the event the consolidation is ultimately adjudged to be dissolved and a separation is ordered, its capital stock, assets, liabilities and accounts can be equitably divided between the consolidating banks in accordance with their respective rights;

3. Pursuant to paragraph 2 hereof, defendant shall:

(a) Keep and maintain stock ledgers and records adequate to show which shares of stock in the consolidated bank have been or are issued in exchange for stock in each of the consolidating banks and preserve all stock certificates of the consolidating banks received in exchange therefor;

(b) Keep and maintain trust records showing which of the consolidating banks was named by the settlor or testator as the fiduciary; and as to qualifications prior to March 1, 1961, showing which of said consolidating banks originally qualified as fiduciary;

(c) Keep and maintain records adequate to identify which of the accounts in the consolidated bank were maintained in each of the consolidating banks as of the close of business February 28, 1961;

(d) Keep and maintain records adequate to identify all equipment, materials, employees, and real or personal property, investments and securities belonging to each of the

consolidating banks or their customers as of the close of business on February 28, 1961;

(e) Keep and maintain records adequate to identify all notes and other obligations held by each of the consolidating banks as of the close of business on February 28, 1961;

(f) Keep and maintain the present Trust Departments of the consolidating banks as at February 28, 1961, at their present locations and with substantially the same personnel;

(g) Keep and maintain records adequate to identify which accounts, notes, loans and other transactions are had with customers who were not customers of either of the consolidating banks prior to March 1, 1961;

4. This order shall continue in full force and effect until further orders of the Court and shall make unnecessary any hearing on the motion for temporary injunction heretofore assigned for Friday, March 10, 1961. The Court reserves the right to make any modification or supplemental orders that may be necessary from time to time in the premises.

5. This case is assigned for trial to the Court in the Federal Court Room at Lexington, Kentucky, on Monday, May 1, 1961, beginning at 9 A.M. (Eastern Standard time) or as soon thereafter as it can be reached in the procedure of the Court.

H. CHURCH FORD
Judge

March 6, 1961

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

Civil No. Lex. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, *Defendants*

Plaintiff-Intervenor Complaint

Plaintiff-Intervenor, Dages I. Boyle, on behalf of himself and First National Bank and Trust Company of Lexington, and Security Trust Company, for his intervening complaint herein states as follows:

(1) Plaintiff-Intervenor, Dages I. Boyle, is a citizen and resident of Fayette County, Kentucky, is a stockholder in defendant Security Trust Company, owning stock therein as appears of record on its corporate books, and is also a stockholder of First Security National Bank and Trust Company of Lexington, owning stock therein as appears of record in its corporate books and was prior to and at the time of merger of defendants a stockholder in each of said banks.

(2) The original complaint filed herein by the United States, and all amendments thereto, are hereby adopted and incorporated herein by reference.

(3) The final judgment entered by this Court on March 18, 1965, as clarified by this Court's order of April 25, 1965, was a final order from which no appeal was taken by any interested party, and said judgment and order was entered

pursuant to the decision of the United States Supreme Court, rendered April 6, 1964.

(4) Under the aforesaid final judgment and order of this Court, and the decision of the United States Supreme Court, rights vested in favor of a new banking association to be the equivalent of the former Security Trust Company, as well as stockholders, depositors, competitors and the public.

(5) The proposed final judgment consented to and presented to this Court for approval and entry impairs and destroys rights vested under the aforesaid judgment of this Court and the decision of the United States Supreme Court, and this Court has no jurisdiction whatsoever to enter a judgment which would, in effect, vacate the March 18, 1965 final judgment of this Court from which no appeal was taken, or can be taken. Said proposed final judgment fails in all respects to effectively restore competition to commercial banking in Fayette County, Kentucky, as it existed prior to the consolidation of First National Bank and Trust Company with Security Trust Company.

(6) The Bank Merger Act (Public Law 89-356, 80 Stat. 7) was enacted by Congress on February 21, 1966, more than 10 months after the judgment of this Court, entered on March 18, 1965, became final and nonappealable. Said Act is unconstitutional because:

(a) It encroaches upon the powers of the judiciary granted in Article III of the United States Constitution to decide cases and controversies, in that it expressly provides that certain mergers, including the merger involved in this case, are conclusively presumed not to have been in violation of Section 1 of the Sherman Act, even though the United States Supreme Court held in a final judgment, dated April 6, 1964, that said merger is in violation of Section 1 of the Sherman Act.

(b) It denies due process of law in violation of the Vth Amendment to the United States Constitution, in that it attempts to nullify the judgment of the United States Supreme Court and the final unappealed judgment of this Court and deprived stockholders, depositors, competitors and the public generally of rights vested under each of those judgments.

(c) It violates the due process clause of the United States Constitution because without any reasonable basis whatsoever it arbitrarily discriminates between insured banks which have merged prior to June 17, 1963, and those that merged and will merge subsequent to February 21, 1966, and between insured and uninsured banks, and between banks and other corporations in other fields of endeavor which have heretofore merged and which may hereafter merge.

(7) Plaintiff-Intervenor, Dages I. Boyle, has been, is, and will be adversely affected if the proposed final judgment is accepted by this Court and adopted as its own.

(8) Plaintiff-Intervenor, Dages I. Boyle, is not adequately represented by the plaintiff or the defendants.

WHEREFORE, Plaintiff-Intervenor, Dages I. Boyle, demands as follows:

1. This Court refuse to enter the proposed judgment now tendered by the plaintiff and the defendants.

2. This Court require full and complete compliance with its final judgment entered March 18, 1965, as clarified by its order entered April 29, 1965.

3. His cost herein expended and such other relief to which he may be entitled.

Respectfully submitted,

FRANK GINOCCHIO
Frank Ginocchio,
Lexington, Kentucky

EARL W. WILSON,
Earl W. Wilson,
Lexington, Kentucky

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Dated: September 15, 1967